

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHEN BAILEY,)	
)	NO. CV-05-5070-LRS
Petitioner,)	
)	ORDER DENYING HABEAS CORPUS
-vs-)	PETITION BY A PERSON IN
)	STATE CUSTODY
RICHARD MORGAN,)	
)	
Respondent.)	
)	
)	

BEFORE THIS COURT is Petitioner Stephen Bailey's second amended petition for writ of habeas corpus, which Mr. Bailey filed while he was in custody at the Washington State Penitentiary, pursuant to his 2003 conviction of the third-degree rape.¹ Judgment and Sentence, *State v. Bailey*, Yakima County Superior Court Cause No. 02-1-02589-2. Mr. Bailey was sentenced to 54 months of incarceration, which was the top end of the standard range.

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¹ Mr. Bailey is no longer serving his sentence as his Department of Corrections Legal Face Sheet shows that he was released from state custody on October 26, 2006. However, the in custody requirement in order to bring a challenge under 28 U.S.C. § 2241 is satisfied in the instant case because he was in custody at the time he first filed his petition. See *Maleng v. Cook*, 480 U.S. 488, 490-491 (1989).

1 Petitioner Stephen Bailey is proceeding pro se and Respondent is
2 represented by Assistant Attorney General Alex Kostin. This matter was
3 heard without oral argument. After careful review and consideration of
4 the papers and the relevant state court record submitted as well as the
5 decisions of the court of appeals denying Petitioner's direct appeal and
6 personal restraint petition, it is hereby determined that the Petition
7 for Writ of Habeas Corpus be **DENIED**.

8
9 **I. PROCEDURAL POSTURE OF THE CASE**

10 Mr Bailey's habeas corpus petition presents four claims for this
11 Court's consideration. See Mr. Bailey's Habeas Corpus Petition at 6-11.
12 First, Mr. Bailey claims that DNA was found, but the results were
13 unavailable for trial, however, the Prosecutor brought up the issue of
14 DNA during examination and closing, but Defendant was excluded as the
15 source of the DNA. Second, Mr. Bailey claims he was charged with second
16 degree rape, found not guilty of second degree rape, but then found
17 guilty of the lesser included charge of third degree rape. Mr. Bailey
18 claims being found guilty of third degree rape constitutes double
19 jeopardy. Third, Mr. Bailey claims that evidence was withheld.
20 Specifically, Petitioner claims that doctors' reports and criminal
21 history information were not given to the Defendant until the time of
22 trial. DNA results also were not provided. Mr. Bailey claims that photo
23 montages said to depict Defendant were false and not provided prior to
24 trial. In addition, he claims witnesses' identities were also withheld.
25 Lastly, Petitioner claims that his conviction should be overturned
26

1 because of prosecutorial misconduct and improper comments by the Judge.
2 Specifically, Mr. Bailey claims Judge Hackett "pointed out my bad
3 behavior."

4 This Court agrees with the State of Washington that Mr. Bailey has
5 failed to exhaust claims one, three and four, and therefore, they are
6 procedurally defaulted. Moreover, this Court finds that Mr. Bailey's
7 argument as to claim two fails on the merits.

8 In order to fully explore Mr. Bailey's claims, it is important to
9 understand what occurred at Petitioner's trial. This Court adopts the
10 summary of the superior court proceedings as outlined in the Court of
11 Appeals decision denying Mr. Bailey's direct appeal, and submitted by the
12 Respondent in Ct. Rec. 16 at 2-6. See *State v. Bailey*, Washington Court
13 of Appeals Cause No. 22075-3-III, at 1-7.

14 In that decision the Court summarized: (quoting directly from the
15 opinion)
16

17 On December 20, 2002, the State charged Mr. Bailey with a
18 single count of second degree rape. At trial, C.A., a
19 15-year-old girl, testified that while on the way home from
20 school her ex-boyfriend, Martin, contacted her across the
21 street from Mr. Bailey's apartment residence. Martin offered
22 C.A. a drink on the porch of Mr. Bailey's residence, and C.A.
accepted. C.A. said Mr. Bailey and a man named Payaso were
there. C.A. said she blacked out after drinking. C.A. said
that when she woke up, Mr. Bailey was on top of her with his
penis inside her. Others followed Mr. Bailey.

23 C.A. testified Mr. Bailey's sister took her to a friend's
24 house. C.A. testified she went back to Mr. Bailey's house with
25 a friend to retrieve her cell phone, "and that's when Stephen
went up to the car, what did I do to you, what did I do to
you?" Report of Proceedings (RP) at 33.

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1 At that moment, the following occurred:

2 THE COURT: All right. You do that one more time - - the
3 defendant held up a sheet of paper that said liar on it. You
4 do that one more time, and you will be removed from this
courtroom, and this case will proceed without you. Is that
very clear, young man?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay. I want that piece of paper, Counsel. Tear
7 it up, please. In fact, take all of the paper away from him.
8 No pencils, no pens, no nothing. All right. Would you repeat
the prosecutor's last question, please. RP at 34.

9 During a recess, the trial court denied Mr. Bailey's mistrial motion
10 arising from the "liar" sign incident. RP at 42-43.

11 C.A. testified her friends belonged to a "red" gang, and that Mr.
12 Bailey belonged to a rival "blue" gang. RP at 54. When defense counsel
13 asked C.A. if a friend would not be disappointed if Mr. Bailey went to
14 prison, the trial court interjected, "Now, she cannot testify as to what
15 someone else is thinking." RP at 55. Defense counsel withdrew the
16 question.

17 The prosecutor objected to the speculative line of questions
18 regarding Mr. Bailey's gang theory, and the court allowed the questioning
19 to continue. But when defense counsel asked C.A. if she would be a hero
20 for a friend if Mr. Bailey went to prison, the trial court interjected,
21 "[b]ad question." RP at 57. Defense counsel withdrew the question and
22 moved away from the line of questions.

23
24 Yakima Police Detective Reynaldo Garza testified Mr. Bailey denied
25 knowing the victim and denied any involvement in a rape. During recross,
26 defense counsel asked Detective Garza a number of questions on the fact

1 that C.A. did not immediately seek medical help after the multiple rapes.
2 The State objected, but the court permitted defense counsel to proceed.
3 Then after a couple of questions, defense counsel asked, "Surely she
4 would have been in a lot of pain, discomfort?" RP at 118. The trial
5 court interjected, "That would require medical testimony." RP at 118.
6 Counsel then withdrew the question.

7 Pursuant to the parties' stipulation, Yakima Police Detective
8 Richard Schuknecht testified regarding a stipulated polygraph
9 examination. Detective Schuknecht said Mr. Bailey answered "no" to two
10 relevant questions indicating deceptiveness regarding whether he engaged
11 in nonconsensual sex with C.A. RP at 149. In cross-examination,
12 Detective Schuknecht agreed there was some possibility Mr. Bailey was
13 being truthful even though the test showed otherwise.

14 Mr. Bailey defended on the theory the rape was a fabrication, an
15 outgrowth of a gang dispute, "reds" versus "blues." Mary Bailey, Mr.
16 Bailey's sister, testified for Mr. Bailey. She said she went to
17 Mr. Bailey's residence on the critical date, but Mr. Bailey was not
18 there. Ms. Bailey said she entered a bedroom, "and the lights were shut
19 off, and it was Martin Garcia was [sic] in the room with that girl
20 [C.A.], and she was screaming at him." RP at 179. Ms. Bailey testified,
21 "[C.A.] didn't say who did anything to her. She just said they." RP at
22 180. Ms. Bailey said she then drove C.A. to her cousin's house.
23 According to Ms. Bailey, C.A. jumped out of her car when they encountered
24 "all the gang member guys, all reds, in pure red, pure gangsters." RP
25
26

1 at 182. Ms. Bailey said C.A. reported the rape "to this guy named Roy.
2 They call him 'Puppet.'" RP at 182. She said the alleged gang members
3 threatened "to shoot our house." RP at 182.

4 In cross-examination, Ms. Bailey claimed her brother was not a gang
5 member, but "[h]e likes blue." RP at 191. On re-direct, Ms. Bailey said
6 some "red" gang members do not like her brother. RP at 192. When
7 defense counsel asked Ms. Bailey if it is standard for reds to "get
8 revenge" on blues, the trial court interrupted, "Well, she's not in a
9 position to testify to that from personal experience." RP at 193.
10 Defense counsel abandoned that line of questioning.

11 Dr. Michael James Hauke testified he treated C.A. at the hospital
12 emergency room. "She presented to the emergency department with a report
13 that she had been raped." RP at 199. "[T]he patient told me that she had
14 been raped, reportedly by several individuals." RP at 201. His
15 examination showed "modest injury in the area of the vagina" and other
16 indicators consistent with "forcible intercourse." RP at 202-03.
17 "[T]here appeared to be some semen present." RP at 203-04. Dr. Hauke
18 testified that C.A. reported she had last had intercourse approximately
19 six months before the rape. The doctor said he was not surprised at the
20 lack of more severe injuries because of her drinking and reported
21 marijuana use.
22

23 In cross-examination on the lack of more severe injuries, defense
24 counsel asked the doctor to assume hypothetically that C.A. was a virgin
25 notwithstanding her admission to the doctor that she had previously had
26

1 sexual intercourse. The doctor replied, "I'm not sure what you're trying
2 to have me speculate on then." RP at 208. The trial court interjected,
3 "Well, let's not speculate. You have to testify within the realm of
4 reasonable medical certainty. So with - are you familiar with that
5 phrase, Doctor?" RP at 208. The doctor replied, "Yes." RP at 208. The
6 trial court continued, "So any answer that you give must be within that
7 context. And if you cannot answer within that context, please indicate."
8 RP at 208-09.

9
10 Defense counsel asked Dr. Hauke if he observed any "scratches or
11 blood" on C.A.'s "face or arms." RP at 216. After the doctor answered,
12 U[n]o," the trial court interjected, "'That's been asked and answered."
13 RP at 216.

14 Yakima Police Officer Kerrick Ward testified C.A. pointed out the
15 rape location on the way to the hospital. Officer Ward related the
16 details of C.A.'s report of being raped by several men including
17 "Telgado," or Mr. Bailey. RP at 243-45. At C.A.'s request, Officer Ward
18 and another officer went to Mr. Bailey's house to recover her cell phone.
19 When discussing the missing cell phone with Mr. Bailey, he denied even
20 knowing C.A. Officer Ward noticed through the open bedroom door that the
21 room matched C.A.'s description of the rape location, particularly an
22 unusual light fixture.

23 Defense witness Annette Cabrera, Mr. Bailey's aunt, testified she
24 lived in the apartment downstairs from Mr. Bailey. Ms. Cabrera said she
25 saw an unidentified young woman being ardently romantic with an
26

1 unidentified young man outside of her apartment on the relevant date.
2 In cross-examination, Ms. Cabrera admitted to a 2000 second degree theft
3 conviction.

4 The trial court instructed the jury on the elements of both second
5 degree rape and the lesser-included offense of third degree rape.

6 In closing, the State partly argued:

7 Now, the defense wants you to think, wants you to believe and
8 find that she was doing this as some sort of gang revenge,
9 some plot to get revenge for the gang that she was part of
10 Well, you saw her testimony. You saw her demeanor and
appearance. Does she look to you like someone who was simply
trying to get even with a rival gang?

11 RP at 289-90.

12 Defense counsel argued C.A., "wasn't concerned about the rape until
13 after she'd talked with her gang buddies." RP at 310.

14 Counsel then summarized:

15 [I] [a]sk you to look at the fact that if Mr. Bailey goes to
16 jail, someone who identifies with the color blue, the color
17 reds are going to be overjoyed, may throw a big party and
18 invite Miss Arreguin over. Main rival is in prison. I would
ask you not to do that, allow her to be the hero. If she goes
back, tells her friends about what happened, her friends see
what happened, she's their hero now. I ask you to recognize
19 this, see all the reasonable doubt I saw, and I think then you
20 will be justified in coming back with a verdict of not guilty.

21 RP at 310.

22 In rebuttal, the State partly argued:

23 . . . This idea of payback. This is all a big way for [C.A.]
24 to pay back a rival gang. Think of your own common
25 experience, folks. Think of your common sense. Nothing in
any of these instructions says that you have to leave your
common sense at the door before you go into the deliberation
26 room.

1 What kind of payback do rival gangs do? They do drive-by
2 shootings and beat the shit out, beat the hell out of other
gangs.

3 THE DEFENDANT: Only if you're scared of them.

4 [DEFENSE COUNSEL]: Your Honor, I'm going to object. We don't
5 have gang people here testifying.

6 THE COURT: Go ahead.

7 [THE STATE]: The point is, [C.A.] was subjected to interview
8 after interview, by police, by [defense counsel] prior to
9 trial, to get on the stand and essentially go through another
interview. That's not how you do payback. That's not how you
get somebody back. It's a joke.

10 RP at 310-11. See *State v. Bailey*, Washington Court of Appeals Cause No.
11 22075-3-III, at 1-7. (Unpublished decision).

12 Mr. Bailey appealed the jury's finding of guilt, and Judge Hackett's
13 sentence of 54 months incarceration. In Mr. Bailey's direct appeal, he
14 argued that: 1. The trial court erred by impermissibly commenting on the
15 evidence and merits of the case when it interjected its own objections
16 during defense counsel's questioning of several witnesses; 2. Appellant
17 was denied his right to a fair trial when the trial court interjected its
18 own objections during defense counsel's questioning of several witnesses;
19 3. The prosecutor committed misconduct when he argued facts not in
20 evidence during closing arguments; and 4. Appellant was denied a fair
21 trial by prosecutorial misconduct during closing arguments. The Court
22 of Appeals rejected Mr. Bailey's arguments and affirmed the jury's
23 decision and Judge Hackett's sentence.

24 After his direct appeal was denied, Mr. Bailey then filed a personal
25 restraint petition, Personal Restraint Petition, Stephen Anthony Bailey
26

1 (Petitioner) [sic], Washington Court of Appeals Cause No. 23817-2, in
2 which he claimed four grounds for relief:

3 1. I should be given a new trial or released from confinement
4 because DNA testimony was ruled prejudicial in my case and suppressed.
5 But the prosecutor brought it up anyways without test results. Recently
6 test results were received and DNA shows my innocence.

7 2. The following facts are important when considering my case: I
8 have a copy of the documents, trial transcripts, jury questionnaires, and
9 letters. Maybe? My old attorney will testify! But this matter really
10 is about new evidence with significant probative value.

11 3. The following reported court decisions: none known. Usually
12 DNA evidence is "the best evidence" and probative as well. I'm not sure
13 if its common to suppress evidence, then speak of such a crucial subject
14 without results, then hide the results.

15 4. The following statutes and constitutional provisions should be
16 considered by the Court: 14th Amendment & 6th Amendment.
17 Mr. Bailey's Petition. at 3-4. The Washington Court of Appeals dismissed
18 the petition. Order Dismissing Personal Restraint Petition, *In re*
19 *Bailey*, Court of Appeals Cause No. 23817-2-III.

21 **II. EVIDENTIARY HEARING STANDARD:**

22 The Anti-Terrorism and Effective Death Penalty Act (AEDPA), alters
23 the standard for determining the necessity for an evidentiary hearing.
24 Prior to the AEDPA, *Townsend v. Sain*, 372 U.S. 293, 312-13, (1963), and
25 *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 4, (1992) identified circumstances in
26

1 which a federal evidentiary hearing was mandatory. The AEDPA, in
2 contrast, significantly restricts the power of district courts to grant
3 evidentiary hearings as follows:

4 If the applicant has failed to develop the factual basis of a claim
5 in State court proceedings, the court shall not hold an evidentiary
6 hearing on the claim unless the applicant shows that--

7 (A) the claim relies on--

8 (I) a new rule of constitutional law, made retroactive to cases
9 on collateral review by the Supreme Court, that was previously
10 unavailable; or
11

12 (ii) a factual predicate that could not have been previously
13 discovered through the exercise of due diligence; and

14 (B) the facts underlying the claim would be sufficient to
15 establish by clear and convincing evidence that but for constitutional
16 error, no reasonable factfinder would have found the applicant guilty of
17 the underlying offense. 28 U.S.C. § 2254(e)(2) (1996).

18 An evidentiary hearing is not required where the petition raises
19 questions of law only or where the issues may be resolved on the basis
20 of the state court record. *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th
21 Cir. 1998); *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir.) (en banc),
22 cert. denied, 511 U.S. 1119 (1994). Even if the petitioner's claim is
23 not precluded under § 2254(e)(2), "that does not mean he is entitled to
24 an evidentiary hearing -- only that he may be. 2254 (e) 2 specifies
25 situations where evidentiary hearings are allowed, not where they are
26

1 required." *McDonald v. Johnson*, 139 F.3d 1056, 1059-60 (5th Cir. 1998)
2 (emphasis in original). In addition, an evidentiary hearing will be held
3 only if the petitioner's claims, if proven, would entitle him to habeas
4 corpus relief. *Campbell*, 18 F.3d at 679.

5 For the reasons outlined below, this Court finds that Mr. Bailey is
6 not entitled to an evidentiary hearing because he cannot satisfy the
7 requirements of 28 U.S.C. § 2254(e)(2). In the present case, Petitioner
8 has failed to develop the factual basis of his claims in State court
9 proceedings. Further, Petitioner has not shown a new rule of
10 constitutional law, a factual predicate that could not have been
11 previously discovered, or that no reasonable factfinder would have found
12 the applicant guilty of the underlying offense to warrant an evidentiary
13 hearing on the claims. The Court finds there is no need for further
14 development of the facts. Accordingly, an evidentiary hearing is denied
15 for failure to meet the requirements under 28 U.S.C. § 2254(e)(2).
16

17 **III. HABEAS STANDARD OF REVIEW**

18 State court judgments carry a presumption of finality and legality.
19 *McKenzie v. McCormick*, 27 F.3d 1415, 1418 (9th Cir. 1994), cert. denied,
20 513 U.S. 1118 (1995). The petitioner must prove "by a preponderance of
21 the evidence" the facts underlying the alleged constitutional error.
22 *McKenzie*, 27 F.3d at 1418-19. A state court's interpretation of state
23 law is binding upon the federal courts. *Oxborrow v. Eikenberry*, 877 F.2d
24 1395 (9th Cir. 1989), cert. denied, 493 U.S. 942 (1989).
25

26 ///

1 Under the AEDPA, a federal court may grant habeas relief if a state
2 court adjudication resulted in a decision that was contrary to, or
3 involved an unreasonable application of clearly established federal law,
4 as determined by the Supreme Court of the United States, or resulted in
5 a decision that was based upon an unreasonable determination of the facts
6 in light of the evidence. 28 U.S.C.A. § 2254(d). "When analyzing a
7 claim that there has been an unreasonable application of federal law, we
8 must first consider whether the state court erred; only after we have
9 made that determination may we then consider whether any error involved
10 an unreasonable application of controlling law within the meaning of §
11 2254(d)." *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir.), cert.
12 denied, 531 U.S. 944, 121 S.Ct. 340 (2000).

14 Further, federal courts apply the *Brecht* standard to determine
15 whether a constitutional error was harmless. Habeas relief is warranted
16 only if the error had a "substantial and injurious effect or influence
17 in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619,
18 638, 113 S.Ct. 1710 (1993); *Bains v. Cambra*, 204 F.3d 964, 977-78 (9th
19 Cir.) cert. denied, 531 U.S. 1037, 121 S.Ct. 627 (2000). That is, the
20 Petitioner is entitled to habeas relief only if he can show that any
21 constitutional violation "resulted in 'actual prejudice.'" *Brecht*, 507
22 U.S. at 619.

24 The AEDPA prohibits a grant of relief on any claim adjudicated in
25 state court unless the state court decision was contrary to or an
26 unreasonable application of clearly established federal law as determined

1 by the Supreme Court. 28 U.S.C. §2254(d). The AEDPA imposes a "'highly
2 deferential standard for evaluation of state-court rulings.'" *Clark v.*
3 *Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003) (quoting *Lindh v. Murphy*, 521
4 U.S. 320, 333 n.7 (1997)).

5 The AEDPA "'demands that state court decisions be given the benefit
6 of the doubt.'" *Clark*, 331 F.3d at 1067 (quoting *Woodford v. Visciotti*,
7 123 S.Ct. 357, 360 (2002)(per curiam)). "This deferential review in
8 habeas cases is premised on the fact that the state courts, as part of
9 a co-equal judiciary, are competent interpreters of federal law deserving
10 of our full respect." *Clark*, 331 F.3d at 1067 (citing *Williams v.*
11 *Taylor*, 529 U.S. 362, 403 (2000)). "[A] federal habeas court may not
12 issue the writ simply because that court concludes in its independent
13 judgment that the relevant state-court decision applied clearly
14 established federal law erroneously or incorrectly." *Williams*, 529 U.S.
15 at 411. "Rather, that application must also be unreasonable." *Id.*

17 IV. EXHAUSTION OF STATE REMEDIES

18 Respondent argues that Petitioner's claims, except for claim 2
19 dealing with double jeopardy, are unexhausted and that he is now
20 procedurally barred from returning to state court in an effort to
21 properly litigate the claims. This Court agrees.

22 Before a federal court will consider the merits of a petition for
23 a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a Petitioner must
24 demonstrate that each and every claim in the petition has been presented
25 for resolution by the state courts. The exhaustion requirement protects
26

1 the role of state courts in enforcing federal law, prevents the
2 disruption of state judicial proceedings, and gives the state courts the
3 first opportunity to examine and vindicate a right of federal
4 constitutional magnitude. *Rose v. Lundy*, 455 U.S. 509, 518-20 (1982).
5 *See also Granberry v. Greer*, 481 U.S. 129, 134 (1987). A Petitioner must
6 exhaust his claims by fairly presenting them to the state's highest
7 court, either through a direct appeal or collateral proceedings, before
8 a federal court will consider the merits of habeas corpus claims pursuant
9 to 28 U.S.C. §2254. *Rose v. Lundy*, 455 U.S. at 519 (1982).

10
11 A convicted state defendant may seek federal habeas relief only
12 after he exhausts his available state court remedies. *U.S. ex rel.*
13 *Falconer v. Lane*, 720 F.Supp. 631, 638 (N.D.Ill.1989). If he does so by
14 obtaining a ruling on the merits of his federal claim, or by fairly
15 presenting his claim through the state court processes, then he is
16 entitled to have a federal court rule on his claim. *Id.* If, on the
17 other hand, he exhausts his state court remedies by defaulting on his
18 federal claim, then he may obtain federal relief only if he can establish
19 one of the following: (1) that the state court's finding of procedural
20 default was not an adequate and independent ground for its decision; (2)
21 that he had cause for the default and was prejudiced by it; or (3) that
22 the failure to grant him relief would result in a fundamental miscarriage
23 of justice. *Id.*

24
25 As the State of Washington correctly argues Mr. Bailey failed to
26 properly exhaust his first claim on direct review because he did not

1 present it in his appellate and pro se briefs filed in the Court of
2 Appeals, and presented it as a non-federal constitutional violation in
3 his personal restraint petition. Respondent's Answer, Exhibit 8, at 3.
4 The claim is not properly exhausted, because on direct appeal Mr. Bailey
5 had to present it as a federal constitutional violation at every level
6 of the state court's review. In addition, Mr. Bailey did not properly
7 exhaust the claim in the personal restraint proceeding, because he failed
8 to petition the Supreme Court for discretionary review. See *Picard v.*
9 *Connor*, 404 U.S. 270, 276-78 (1971). Similarly, Mr. Bailey's third and
10 fourth claims are not properly exhausted because he did not present them
11 at every level of state courts' review. He did not present them to the
12 Court of Appeals, and presented them for the first time to the Supreme
13 Court in his motion for discretionary review.
14

15 Mr. Bailey cannot show, nor does he argue, that he had cause for the
16 procedural defaults of three of his claims. Similarly, a petitioner's
17 own inadequacies and lack of expertise in the legal system do not excuse
18 a procedural default. *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d
19 905, 907-09 (9th Cir. 1986); *Thomas v. Lewis*, 945 F.2d 1119 (9th Cir.
20 1991). Moreover, any additional personal restraint petition will be
21 summarily denied by the state court because it would be deemed a
22 successive petition. See RCW 10.73.140, which bars successive petitions.
23 These claims are thus procedurally defaulted. Therefore, claims one,
24 three and four are denied and dismissed.
25

26 ///

1 **V. MR. BAILEY'S SECOND CLAIM FAILS ON THE MERITS**

2 Mr. Bailey properly exhausted his second claim, however, Mr. Bailey
3 cannot show that his federal constitutional rights were violated by the
4 inclusion of the instruction on the "inferior degree" crime of
5 third-degree rape. The inclusion of this instruction did not violate Mr.
6 Bailey's federal constitutional rights because the inclusion of the
7 "inferior degree" crime of third-degree rape was appropriate under
8 Washington law. The trial court included the instruction on the
9 second-degree rape and third-degree rape in its instructions to the jury.
10 Mr. Bailey was charged with second-degree rape only. *Information, State*
11 *v. Bailey*, Yakima County Superior Court Cause No. 02-1-02589-2. As the
12 State of Washington concedes, Mr. Bailey is correct that third-degree
13 rape is not a "lesser included offense" of second-degree rape under
14 Washington law. *See State v. Charles*, 126 Wn. 2d 353 (1995) ("A lesser
15 included offense is proper only if each element of the lesser offense is
16 necessarily included in the charged offense and 'there is sufficient
17 evidence to support an inference that the lesser crime was committed.'" (citations omitted)). Third-degree rape is not a lesser included offense
18 of the second-degree rape, because third-degree rape elements and not
19 necessarily the elements of second-degree rape. *State v. Ieremia*, 78
20 Wash. App. 746, 748 (1995).

21 While third degree rape is not a lesser included of second degree
22 rape, third-degree rape is in an "inferior degree" crime of the
23 second-degree rape. Third-degree rape instruction is necessary when

1 either the defendant or the state produces affirmative evidence that the
2 defendant was guilty only of the third-degree rape. *Id.* See also, RCW
3 10.61.003, which states that Defendant may be found not guilty of charged
4 offense and guilty of any degree inferior. See also *State v. Peterson*,
5 133 Wash.2d 885, 891 (1997)(where the Washington State Supreme Court
6 defines inferior offenses.) Federal courts will presume that the state
7 courts properly applied their own law. *Woratzeck v. Stewart*, 97 F.3d
8 329, 336 (9th Cir. 1996).

9
10 As the State of Washington argues the testimony of the victim
11 produced the evidence that Mr. Bailey committed third-degree rape.
12 Because of this, the inclusion of the instruction of the "inferior
13 degree" crime of third-degree rape was appropriate under Washington law,
14 and consequently did not violate Mr. Bailey's constitutional rights.
15 Therefore, his habeas corpus petition fails and is **DISMISSED WITH**
16 **PREJUDICE.**

17 The District Court Executive is hereby directed to file this Order,
18 provide copies to counsel and pro se Petitioner, **CLOSE THE FILE**, and
19 **ENTER JUDGMENT** in favor of Respondent accordingly.

20
21 DATED this 14th day of December, 2007.

22 ***s/Lonny R. Suko***

23
24 _____
25 LONNY R. SUKO
26 United States District Judge